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In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether a welder working on a fixed platform in Louisiana territorial waters is covered under the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §§901, et seq., particularly §§902(3) and 903.)

(2) Whether workmen engaged in support activities (such as welding) in connection with mineral extractive activities are engaged in "maritime employment" (33 U.S.C. §902[3]).

(3) Whether workmen on fixed platforms in Louisiana territorial waters are working in a covered situs as required by 33 U.S.C. §903.

(4) Whether oil field labor, such as welding, is "maritime employment" as that term is contemplated in the Longshoremen & Harbor Workers Compensation Act, 33 U.S.C. §902[3].

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed below:

Robert H. Gray
Herb's Welding, Inc.
United States Fidelity & Guaranty Co.
Director, Office of Workmens Compensation Programs, United States Department of Labor.

Pursuant to Rule 28.1 of the Rules of this Court, undersigned counsel certifies to the Court that, after diligent investigation, he is advised that the United States Fidelity & Guaranty Co. has no parent, companies, affiliates or subsidiaries as those terms are used in said rule. Undersigned counsel further certifies that Herb's Welding, Inc. is no longer in existence, however, based on personal knowledge, it had no parent companies, affiliates or subsidiaries, either, when it was in operation.

Wood Brown III

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IN THE
SUPREME COURT OF THE UNITED STATES

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ROBERT H. GRAY

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Herb's Welding Inc. and United States Fidelity & Guaranty Co. petition this Court for a Writ of Certiorari to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit in this case. Petitioners were appellants in that Court in the final analysis and were respondents in the administrative determinative processes before the U.S. Department of Labor (Benefits Review Board and Office of Administrative Law Judges).

OPINIONS BELOW

The opinion of the Court of Appeals (Ap. A, *infra*, A-1) is reported at 703 F.2d 176 (5th Cir. 1983). Petitioners

applied for a rehearing and suggested that the matter be heard by the Court of Appeals en banc. This application and suggestion were denied by the Court on August 8, 1983. The denial is reported at 711 F.2d 666 (5th Cir. 1983) and is appended hereto as Appendix B.

Other opinions below are appended as well. The original "Decision and Order" of the Administrative Law Judge is appended as Appendix C. The initial decision of the Benefits Review Board is appended hereto as Appendix D. An appeal was taken to the Fifth Circuit Court of Appeals which was dismissed by order as being premature. The dismissal is appended hereto as Appendix E. The "Decision and Order on Remand" of the Administrative Law Judge is appended hereto as Appendix F. The "Decision and Order" of the Benefits Review Board on appeal from that decision is attached as Appendix G.

JURISDICTION

The opinion of the Court of Appeals in this case was handed down on April 18, 1983. The application for rehearing was timely filed, together with a separate suggestion that the matter should be reheard en banc. The application and suggestion were denied by the appellate Court on August 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Sections 2(3) and 2(4) of the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §§902(3) and 902(4)) provides in pertinent part:

(3) The term "employee" means any person

engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker ...

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a) of the Longshoremen & Harbor Workers Compensation Act (33 U.S.C. §903(a)) provides in pertinent part:

Sec. 3.(a) Composition [sic] shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel ...

STATEMENT OF THE CASE

The facts applicable to this case are stated by the organ of the Court of Appeals (703 F.2d at 177):

"Gray, a welder with Herb's Welding, was assigned to the Bay Marchand oil and gas field which is located both in Louisiana territorial waters and over the Outer Continental Shelf.

There Gray helped repair and maintain oil and gas lines and fixed platform production structures.

When he was on duty, Gray lived, ate and slept on a structure situated in Louisiana waters, and he worked on platforms located in both Louisiana and Outer Continental Shelf waters. He was transported to his daily work sites by boat or helicopter. On July 11, 1975, Gray was welding a two-inch gas line on a platform in the navigable waters of Louisiana when an explosion occurred. Gray, in trying to run from the area, twisted his knee.

The insurance company paid Gray temporary total disability, permanent partial disability and related medical expenses under Louisiana worker's compensation. ..."

JURISDICTION IN THE FIRST INSTANCE

The underlying issue in this case is whether there is jurisdiction under the Longshoremen & Harbor Workers Compensation Act in the first instance. The claimant invoked the jurisdiction of the Office of the Administrative Law Judges of the United States Department of Labor under Section 19 of the Longshoremen & Harbor Workers Compensation Act Extension of 1972 (33 U.S.C. §919(d)). The jurisdiction of the Benefits Review Board, if any, is vested by Section 21(b) of the LHWCA (33 U.S.C. §921(b)). The Jurisdiction of the Court of Appeals is vested by the operation of Section 21(c) of the LHWCA (33 U.S.C. §921(c)).

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals has decided an important point of federal law inconsistently with prior decisions of this Court. The decision was that oil field production work is maritime employment and this decision is inconsistent with this Court's decisions in *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969) and *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

(2) The decision of the Court of Appeals has decided an important point of federal law which has not been decided by this Court previously and which should be settled by this Court.

This point is whether any part of a stationary platform located in Louisiana territorial waters[1] is a covered "situs"[2] under the LHWCA where that portion of the platform is not being used for loading and unloading of vessels or engaged in other statutorily defined "maritime employment activities". The Court of Appeals decided that a covered "situs" existed and this point should be decided by this Court.

(1) PREAMBLE TO ARGUMENT ON REASONS

The suggestions of reasons for granting the writ are not distinct and there are points which must be made on

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[1] Thus, by its very terms, the Outer Continental Shelf Lands Act (43 U.S.C. §1331, et seq.) does not apply to the juridical transaction which forms the basis of this litigation. The platform, by definition lies within Louisiana's territorial waters, not on the Outer Continental Shelf.

[2] See the analysis in *Northeast Marine Terminals, Inc. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977)

each which are similar. In considering this application, it is first necessary to look at the rationale of the opinion below. The Court there properly states the threshhold issue: whether the LHWCA can reach an oil field worker injured on a fixed platform located in Louisiana territorial waters. Reference was immediately made to this Court's decision in *Rodrigue, supra.* It is stated that this Court "likened" these offshore platforms to wharves located over navigable waters. It is then stated that wharves and piers were not covered by the LHWCA prior to 1972 (and therefore were not covered at the time of the decision in *Rodrigue*).[3] However, since the LHWCA amendments in 1972 extended coverage to wharves and piers, this in effect overruled that portion of *Rodrigue* and constituted oil field platforms as covered siti.[4]

In making this determination the Court of Appeals stated that these platforms "are essential to and customarily used in the loading and unloading of crews, supplies and oil." The Court used this factor to buttress the conclusion that the fixed platform is a covered situs.

The opinion than proceeds to discuss status and, premised on the same Court's previous decisions in *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981) and *Boudreaux v. American Workover, Inc.*, 664 F.2d 463 (5th Cir. 1981),

[3] See *Victory Carriers v. Law*, 404 U.S. 202, 92 S.Ct. 418 (1971)

[4] Here, again, the dichotomy between platforms on the Outer Continental Shelf and those in state waters should be kept in mind. Accidents and injuries which occur more than three miles offshore are covered by the LHWCA because of the operation of the Outer Continental Shelf Lands Act (OCSLA). *Rodrigue* did not deal with this point because (1) it was not before the Court, it could not be, and because (2) OCSLA mandated coverage by the LHWCA. The point here is that *Rodrigue* is irrelevant in a determination of "situs". The situs there was present as a matter of law. More on this later.

680 F.2d 1034 (5th Cir. 1982), Cert. denied, __ U.S. __ 103 S.Ct. 815 (1983). The Court held that, as a matter of law, oil field labor is "maritime employment" as that term is defined in the LHWCA.[5] On the basis of this, the determination is made that Gray was covered satisfying both the situs and status tests mandated by this Court's earlier decisions.

Thus, what we have is the use of this Court's landmark decision in *Rodrigue* to justify a finding of "situs", something that was not at issue there and something that decision does not stand for at all. And, in the very next section of the opinion, the Court turns its back on *Rodrigue* and decides that oil field work is maritime in nature, something totally inconsistent with the letter and spirit of the *Rodrigue* decision.

This leads to the two reasons we advance for the favorable consideration by the Court of this application. First, the decision by the Court of Appeal that there is "status" in this case is contrary to the spirit of *Rodrigue*, therefore is contrary to prior decisions by this Court. Second, the decision by the Court of Appeals that inshore platforms are covered "siti" is not mandated by *Rodrigue* (as the Court of Appeals holds) but is something new, something that has not been held before and is something which, if it is the law, this Court should decide it. Put another way, there is nothing in the LHWCA or the amendments of 1972 which extends the coverage of this federal statute to these structures. If the act is to be construed that such an intention existed, this Court should make that construction.

[5] The same Court has more recently taken this "principle of law" as being established in "this circuit", citing its own decisions in *Pippen, Boudreaux*, and in the instant case. See *Thornton v. Brown & Root, Inc.*, 707 So.2d 149 (5th Cir. 1983).

(2) ARGUMENT ON POINT 1

The Decision Below is Contrary to Prior Decisions By This Court.

As mentioned above, a finding of coverage under the LHWCA requires a dual determination that there is a covered "situs" and a covered "status". In its determination of "status" the Court below makes a determination that oil field labor is "maritime employment". This determination is directly contrary to this Courts decision in the *Rodrigue* decision.

The issue in *Rodrigue* was whether plaintiffs in wrongful death actions could avail themselves of Louisiana law as regards recovery, or whether they were limited to the less generous provisions of the Death on the High Seas Act. This Court, reversing the Fifth Circuit held that offshore platforms were islands, that they were treated like federal enclaves in state territory, that federal law applied except where there was an hiatus therein, in which cases Louisiana law applied. On the face of it, it does not seem that that decision has anything to do with the dispute before the Court in the captioned case.

However, a review of the case, especially in the light of the appellate decisions[6] and in the light of a subsequent decision explaining and limiting the result,[7] it is apparent that, *prior* to this Court's decision in *Rodrigue*, oil field workers were held to be maritime workers, essentially because the work they performed was performed in a

[6] *Dore v. Link Belt, Inc.*, 391 F.2d 671 (5th Cir. 1968); *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 F.2d 216 (5th Cir. 1968).

[7] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971).

location surrounded by water and because the work they did was essential to the commerce of the area, which, being on the water, was "maritime". Indeed, this is the rationale of the two appellate decisions which were reviewed and reversed in the decision by this Court in *Rodrigue*.

Those cases, applying then settled jurisprudence, make the admiralty law applicable and take the expected next step to oust state law because of the uniformity of the admiralty principle. This Court's opinion in *Rodrigue* is a complete treatise on why admiralty law does not apply. The legislative history is traced, leading to the conclusion that Congress did not intend that admiralty law apply to persons working on platforms on the outer continental shelf. This history is only tangentially important here because this platform on the facts, was not on the outer continental shelf. What is important in the *Rodrigue* decision is the rationale which supports the conclusion that these workmen are, essentially, landbased workers doing land based type work.

The *Huson* decision, which came down two years later makes it abundantly clear what the Court was doing in *Rodrigue*, that is, abandoning admiralty law in favor of state law as to disputes arising on fixed platforms. This decision involved the application of Louisiana prescription (statute of limitations) which would have barred plaintiff's claim. The precise holding is that the plaintiff in that case would not be barred because of his reliance on the "pre-Rodrigue application of admiralty law". However, the result makes it clear that prior to *Rodrigue*, admiralty law applied to these cases.

The point here is that *Rodrigue* and *Huson* stand for the proposition that offshore oil field workmen are not

"maritime workers". If it were any other way, perhaps it could be said that there would be a resort to Louisiana wrongful death relief (barring application of the uniformity principle) but there is no way it would be said that Louisiana prescription applies. If these men were maritime workers, then the maritime doctrine of laches would necessarily apply. Put another way, if the Court of Appeals in this case is right, then Mr. Huson did not need to come here, prescription was no problem to him and Mrs. Dore and Mrs. Rodrigue would have gotten only pecuniary losses rather than the more generous recovery permitted under Louisiana law. But that didn't happen, and the reason it didn't was, in part, due to the fact that Mess'rs Dore, Rodrigue and Hudson were *not* maritime workers.

Admittedly, *Rodrigue* and *Huson* involve cases which arose on platforms on the outer continental shelf. However, there is no demonstrable or demonstrated difference between the work described in those opinions or of work on the outer continental shelf in general and the work described in the case at bar. Indeed, the statement of facts in this case is that Gray worked sometimes on the outer continental shelf and sometimes on the state water platforms. Any distinction that *Rodrigue* and *Huson* are somehow different because they arose offshore and Gray arose inshore would be a distinction without a difference.

The genesis of the notion that oil field labor is somehow "maritime" in nature comes originally from the Fifth Circuit's opinion in *Pippen v. Shell Oil Co., supra.* It was carried forward by the same Court in *Boudreaux v. American Workover, Inc., supra.* A writ application was forwarded to this Court in *Pippen*, but was late filed and was therefore rejected by the Clerk. The writ application in *Boudreaux* was filed and was later denied by the Court on

the basis of the then recent decision of this Court in *Director v. Perini North River Associates*, __ U.S. __, 103 S.Ct. 634 (1983).[8]

There is nothing in *Pippen*, or *Boudreaux*, or this case, or the more recent decision of the Fifth Circuit in *Thornton v. Brown & Root*,[9] which justifies factually the conclusion that production of minerals from the seabed is "maritime commerce" or that the work being performed by those so engaged is maritime employment. If some factual showing had been made below and if this factual showing were stated into the opinions as justifying a change in this

[8] The decision in *Director v. Perini* was on the basis of a finding that Mr. Churchill, the claimant there, would have been covered by the LHWCA prior to the passage of the 1972 amendments, and, since there was no evident intention on the part of Congress to restrict coverage, Churchill would necessarily be covered thereafter. On this basis, the decision of the Second Circuit denying benefits was reversed.

This result controlled the *Boudreaux* decision since Mr. Boudreaux had been hurt on a barge and he would have been covered by the LHWCA before 1972. No reasons were assigned for the denial of the writ but it is assumed that this was the reason for the denial. The question ancillary to that in *Boudreaux*, which adopted the reasoning in *Pippen* concerning the "maritimeness" of oil field work was not addressed by this Court.

The result in *Director v. Perini* does not control this decision because the accident to Mr. Gray did not occur on a vessel, but on a platform. There is no "instant situs" in this case.

[9] 707 F.2d 149 (5th Cir. 1983). *Thornton* holds that workers on land constructing offshore platforms are covered by the LHWCA their work is on the platforms which are used in the "maritime commerce" of producing oil from the seabed. This is the "next step" from the unsupported conclusion of *Pippen*, perpetuated in *Boudreaux* and in the opinion which is the subject of this application.

To the extent that this conclusion is one of law, we suggest that it, as well, is a matter which has not been passed on by this Court and that it is something that this Court should pass on, and we will treat of this in the next section as well.

Court's conclusion in *Rodrigue,* then, perhaps there would be some justification for the differing result. However, as mentioned, there is no such factual justification either made or stated. Without such justification, we suggest that this Court's decisions in *Rodrigue* and *Huson* control. There is nothing maritime about the work which Robert Gray was doing at the time of his injury.

There is no automatic status finding because someone was involved in the production of minerals from the seabed of Louisiana waters. The holding to the contrary by the appellate court below is contrary to the prior decisions of this Court and should not be permitted to stand.

(3) ARGUMENT ON POINT 2

The Decision Below is on an Important Point of Federal Law which Should be Decided by This Court.

The federal point here is whether fixed platforms in state territorial waters are "siti" or locations as contemplated by the LHWCA such that maritime workers injured thereon are covered by the act. This Court has not passed on that point.

To start with, as conceded in the appellate opinion below, *Rodrigue* requires that this platform be treated as an island (703 F.2d at 179). There is nothing in the facts which would bring this platform or the location where the accident happened within the statutory definition of a covered situs. The statute says that accidents and injuries are covered where they occur "upon the navigable waters of the United States including any adjoining pier, wharf, dry-dock, terminal, building way, marine railway or other

adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."[10] The facts of this case do not on their face bring the area where the accident occurred within that definition, especially in view of the *Rodrigue* opinion which makes this an island.

The reasoning of the Court of Appeals is that, since this Court "likened" platforms to wharves in the *Rodrigue* decision and since Wharves were not covered in 1969 but are not, as a result of the 1972 amendments to the LHWCA, therefore platforms are wharves and constitute covered "siti" at this time.

Two analyses have to be made of this reasoning. First, can it be said in the passage of the LHWCA extension in 1972 that Congress intended to extend coverage to all oil field workers on inshore platforms? Secondly, is the analogy to the language of the *Rodrigue* decision appropriate in this case?

(a) *Congress' Intention*

It is, of course, undeniable that there is nothing in the 1972 extention of the LHWCA concerning oil field workers. More to the point, there appears to be nothing that evidences an intention to extend coverage of the act to workmen on platforms in state waters who were never covered before. See *Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir. 1972); *Gray v. Chevron Oil Co.*, 631 F.2d 1263 (5th Cir. 1980), 644 F.2d 540 (5th Cir. 1981).[11]

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[10] 33 U.S.C. §903(a).

[11] *Gray v. Chevron*, referred to above, involves the same Robert H. Gray who is respondent here, and reaches a directly contrary to the result here, at least on its face. Gray filed a suit in tort against Chevron

It is true that another bill was considered in the U.S. Senate at approximately the same as the 1972 extension of the LHWCA which would have extended the LHWCA to all oil field workers, whether or not they were "seaman".[12] This writer does not find anything in the materials concerning that bill which would have indicated an intent to extend LHWCA coverage to platform workers in state waters (or, to the contrary to exclude them from coverage). However, the bill was broad enough arguably to extend coverage to everyone engaged in "maritime extractive operations." The important point in mentioning this bill is that the bill did not pass!!

(Footnote 11 continued)
for his injuries. Chevron interposed a "statutory employer" defense permitted in Louisiana. Louisiana extends the tort immunity of the employer to the general contractor or "principal" as well. See *Broussard v. Heebe's Bakery, Inc.*, 263 La. 561, 268 So.2d 656 (1968); *Barnes v. Sun Oil Co.*, 362 So.2d 761 (La. 1978). This principle was subsequently codified into positive law, La. Act 147 of 1976, La. R.S. 23:1032.

The point of this is that Chevron successfully interposed the Louisiana defensive doctrine and this was affirmed by the Fifth Circuit on the basis that this was a Louisiana state case, having occurred on an inshore platform, and that the LHWCA did not apply. In this case which is the subject of this appeal, the Court reversed itself, without mentioning its prior decision, holding that the LHWCA did apply. The anomaly is treated by the Court in its per curiam in the denial of the application for rehearing and the suggestion of rehearing en banc.

While the rationales of the two decisions are clearly inconsistent, the results are not necessarily so. It is legally possible for two compensation schemes to operate in the same geographical area, *Sun Ship Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432 (1981). There is nothing abhorrent in permitting a claim under one act and applying the defensive provisions of both acts to compensation claimant's suit in tort. Louisiana has a "statutory employer" defense and the LHWCA prohibits suits against co-employees.

[12] This was the so-called "Tower Bill" Senate Bill 1547, 92nd Congress. The hearings on this bill and the LHWCA extension were held at the same time. Hearings Before the Senate Subcommittee on Labor, Senate Committee on Labor & Public Welfare on S2318, S525 and S.1547, 92d Congress, Second Session.

It is possible to infer, from some of the discussion reported[13] that Congress intended to maintain coverage for those workers covered at the time of the discussion in the then pending extension of the LHWCA. (Which is the sense of the *Perini* case, *supra*.) However, the fact of the non-passage of this bill, given its subject matter (coverage of all workers engaged in "marine extractive operations") coupled with the failure to include oil field workers *at all* in the extension of the LHWCA[14] leads inexorably to the conclusion that workers in the same category as Mr. Gray were not intended to be included in the extension.

They are not mentioned, expressly or by implication. Second, a bill which likely would have included them was not passed by the Congress. The combination of these factors indicates that Congress did not intend that the extension act of 1972 to include these workers.

Finally, on this point, a welder on a production platform in state territorial waters is no more engaged in "maritime employment" than would be the employee hired to handle stored cargo in connection with transshipment or the clerical employees mentioned by Congress (S. Rep. 92-1125, p. 13 (1972); H. Rep. 92-1441, p. 10-11; U.S. Code Cong. & Adm. News, 1972, p. 4708, et seq.), and mentioned by this Court in *P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 at 79-80, 100 S.Ct. 328 at 335-36 (1979). Moreover, if this platform in inshore waters is to be treated as a covered

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[13] Id. at 256, 487, 574, 577.

[14] In considering this, the Court should not be misled by the fact that oil field workers on the outer continental shelf are covered by the LHWCA because of the specific terms of the Outer Continental Shelf Lands Act, 43 U.S.C. §1333 (as it existed at the time this accident occurred in 1975). This is so, obviously, because Congress mandated that it be so, something that cannot be said of workers on Louisiana state water platforms.

"situs", it must be so treated as an *onshore* situs under *Pfeiffer, supra.* The point here is that there is nothing in Congress' action in the 1972 extension act which evidences an intention to cover Gray, either as a welder or as a maritime extractive worker on a fixed platform on Louisiana territorial waters.

(b) *Analogy to Rodrigue*

This leads to the second point. Boiled down to its essentials, the reasoning of the Court of Appeals on the "situs" question is that (1) this Court in *Rodrigue* "likened" platforms to wharves, (2) wharves were not covered in 1969 when Rodrigue was decided; however, (3) wharves are covered now by virtue of the 1972 extension of the LHWCA, (4) therefore, platforms inshore are covered now.

We respectfully submit that the opinion of this Court at no time "likened" platforms to wharves. The word is used *once* in the *Rodrigue* opinion, then in the context of a discussion of the history of the OCSLA (395 U.S. at 366, 89 S.Ct. at 1842). Even the "likening" defeats the analogy because the remark in which wharves are referred to is a notation that accidents thereon were not covered because Congress, at that time, had not mandated that there be coverage. The point is that the opinion of this Court does not equate wharves and piers on the one hand with offshore platforms on the other. The sense on the opinion is more one of differentiation than of equating the structures and their purposes.[15]

[15] This "likening" or equating by the Court of Appeals is also unsupported in the record before the Court. There is nothing which indicates that the area of the platform where Gray was injured was used for loading and unloading (704 F.2d at 178) or that the entire platform was so used (704 F.2d at 179). Of course, if this were true, then the area is

We further respectfully submit that the reasoning that this Court used in *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 92 S.Ct. 418 (1971) is applicable here.[16] There, the suggestion was made that there should be coverage to workmen on wharves because they were doing essentially the same work that their co-workers were doing in the holds of the ships only a short distance away. This Court rejected the argument and closed with the following:

> "... Congress might well prefer not to extend the jurisdiction of the federal courts. On the other hand, if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and II of the Constitution to enact a suitable solution."

This is no less true in this case. It is apparent from that above that Congress has not seen fit to extend coverage to workers on fixed platforms in state waters. It

(Footnote 15 continued)
a maritime "situs" because of this fact alone. That it is not so in this case is seen by the mental gymnastics indulged by the Court of Appeals in resorting to the misinterpretation of the *Rodrigue* decision to justify its conclusion. Put another way, if there was maritime "situs" as a result of the nature of the activity thereon, why go to the trouble to justify it otherwise on such shaky grounds?

More to the point, a careful reading of the underlying decisions of the Administrative Law Judge and of the Benefits Review Board indicate absolutely no basis for such a conclusion. Under the appellate scheme set up in the LHWCA (33 U.S.C. §921[c]) findings of fact must be made on the trial level. If such a finding were necessary, then, perhaps the matter should have been remanded once more because it simply does not exist otherwise in the record before that Court or the record here.

[16] The incidental parallels in the case are noteworthy. The same Court of Appeals involved here was involved there and the result obtained, extension of the LHWCA into areas not then intended, was the same as here.

is also apparent that Congress had before it a bill which would have had the effect of extending such coverage and that that bill was not passed. The effect of the decision of the Court of Appeals is to accomplish with the stroke of a judicial pen that which Congress declined to do.

CONCLUSION ON REASONS FOR GRANTING THE WRIT

In conclusion on this point, we respectfully suggest that the decision of the Court of Appeals that oil field labor is "maritime in nature" is (1) not supported in the record of this case or of the cases to which reference is made; (2) is directly contrary to and in the face of the major prior decisions of this Court on point, and (3) Constitutes a decision of an important point of federal law which should be decided by this Court. Specifically, Congress declined to grant coverage under the LHWCA to claimants like Mr. Gray by failing to adopt the Tower Bill mentioned above. If coverage is to be extended judicially, it should be this Court which extends it, not the Court of Appeals.

Likewise, the holding that platforms in state waters are covered "siti" is something that Congress failed to enact, given the specific opportunity to do so. If the failure of Congress to pass this bill is to be corrected by the Courts, it should be this Court which makes the correction, not the Court of Appeals.

However, following the logic that this Court has followed previously, we suggest that the extension of coverage to plaintiffs like Mr. Gray is something which should be left to Congress. When the Court of Appeals usurped Congress' function in making such an extension, it erred and this error should be reversed by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this petition and all related documentation has been mailed to each opposing counsel as follows:

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Undersigned counsel makes this certificate for purposes of complying with Rule 28.3 and 28.5 of the Rules of this Court.

Wood Brown III

APPENDIX "A"

HERB'S WELDING and United States Fidelity & Guaranty Company,
Petitioners,

v.

Robert H. GRAY, Jr. and The Director, Office of Workers' Compensation Programs, United States Department of Labor,
Respondents.

No. 82-4147

United States Court of Appeals,
Fifth Circuit

April 18, 1983

Benefits Review Board awarded compensation under the Longshoremen's and Harbor Workers' Compensation Act, and employer appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) the Act as amended in 1972 can reach offshore oil field worker injured upon fixed platform located in Louisiana waters, and (2) worker who did welding and maintenance work on offshore platforms and at time of injury was welding gas lines, his work being necessary for offshore drilling process, which is maritime commerce, was employed in maritime employment and was covered.

Affirmed.

John F. Simon, Alexandria, La., for petitioners.

Joshua T. Gillelan, II, James J. Brady, T. Gerald

Henderson, Alexandria, La., for respondents.

Petition for Review of a Final Order of the Benefits Review Board.

Before CLARK, Chief Judge, THORNBERRY and REAVLEY, Circuit Judges.

CLARK, Chief Judge:

Herb's Welding, a company which provides welding services to oil field rigs, appeals from a Benefits Review Board award of compensation to Robert H. Gray under the Longshoremen's and Harbor Workers' Compensation Act. We affirm.

Gray, a welder with Herb's Welding, was assigned to the Bay Marchand oil and gas field which is located both in Louisiana territorial waters and over the Outer Continental Shelf. There Gray helped repair and maintain oil and gas lines and fixed platform production structures.

When he was on duty, Gray lived, ate and slept on a structure situated in Louisiana waters, and he worked on platforms located in both Louisiana and Outer Continental Shelf waters. He was transported to his daily work sites by boat or helicopter. On July 11, 1975, Gray was welding a two-inch gas line on a platform in the navigable waters of Louisiana when an explosion occurred. Gray, in trying to run from the area, twisted his knee.

The insurance company paid Gray temporary total disability, permanent partial disability and related medical expenses under Louisiana worker's compensation. The carrier refused to pay benefits under the Longshoremen's and

Harbor Workers' Compensation Act (LHWCA). An administrative law judge refused the LHWCA claim finding that Gray was not involved in maritime employment. The Benefits Review Board reversed the denial of benefits on the ground that Gray was covered under the Outer Continental Shelf Lands Act and remanded the case for entry of an award. The administrative law judge awarded $10,000 and deducted the $3,000 already awarded under the state law.

The parties have devoted a considerable amount of their appellate effort to discussing whether the Outer Continental Shelf Lands Act applies to this case. We need not reach this issue since we find that Gray qualifies for coverage under the LHWCA.

At the threshold, we must decide whether the LHWCA can reach an offshore oil field worker injured upon a fixed platform located in Louisiana waters. In *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969), the Supreme Court declared that fixed offshore platforms are artificial islands and therefore outside traditional maritime jurisdiction. *Id.* at 365-66, 89 S.Ct. at 1842. The *Rodrigue* Court determined that the Death on the High Seas Act, 46 U.S.C. § 761, did not apply to wrongful death actions brought by the families of two men who were killed upon fixed platforms on the Outer Continental Shelf off the coast of Louisiana. Justice White wrote that traditional admiralty jurisdiction did not extend to these platforms. He likened them to wharves located above navigable waters. *Id.* at 366, 89 S.Ct. at 1842.

In 1972, three years after *Rodrigue* was written, Congress amended the Longshoremen's and Harbor Workers'

Compensation Act to extend the area of its coverage. Prior to the amendment, the Act required a covered injury to occur "upon navigable waters." 33 U.S.C. § 903(a) (1970). The amendment added coverage for accidents occurring upon "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C. § 903(a) (1975). At the time *Rodrigue* was written, wharf-like fixed platforms were outside the coverage of the Act. Today, accidents upon wharves over navigable waters are within the statutory jurisdiction of the LHWCA. It would be incongruous, therefore, not to extend LHWCA jurisdiction to the fixed platform in this case. Such platforms are essential to and customarily used in the loading and unloading of crews, supplies and oil. Their function is precisely that of wharves over navigable waters. The jurisprudential concept of an island carries with it the concept of the island's shore and the function of the structure as a wharf projects from that "land."

For the purposes of the LHWCA, it makes no difference that the navigable waters involved are also state territorial waters. *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1035-36 (5th Cir. 1982) (en banc), *cert. denied*, __ U.S. __, 103 S.Ct. 815, 74 L.Ed.2d 1013 (1983). Workers injured on movable drilling barges are covered under the LHWCA whether the vessel on which they work is located in territorial or Outer Continental Shelf waters. *Id.* Workers injured on fixed platforms located upon the Outer Continental Shelf receive LHWCA coverage through the Outer Continental Shelf Lands Act.[1] Workers en route

[1] The Outer Continental Shelf Lands Act provides, in relevant part:

to fixed platforms are granted coverage. *Nalco Chemical Corp. v. Shea*, 419 F.2d 572 (5th Cir. 1969). To bar from the Act's coverage all fixed-platform workers in territorial waters would create a curious hole in LHWCA coverage.[2] We decline to do it.

(Footnote 1 continued)

> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the Outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

43 U.S.C. § 1333(b).

[2] This sort of checkered coverage would harken back to the days of "maritime-but-local" exceptions. *Grant-Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed. 321 (1922), which were abandoned in *Davis v. Dept. of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942).

Administrative law judges' decisions have found fixed platforms in territorial waters to be located upon navigable waters for the purposes of the LHWCA. Neal v. Wilson Wireline Services, 2 BRBS 88 (1975); Henning v. Vacco Wireline Services, 2 BRBS 87 (1975); Wiley v. Wilson Wireline Services, 2 BRBS 86 (1975). A commentator on this area has favored including workers on such structures within LHWCA coverage. Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Tex.L.Rev. 973 (1977). Robertson says that "the handful of post-1972 coverage determinations suggest that work on fixed platforms meets the new navigable waters criteria." *Id.* at 994. He notes that the Benefits Review Board has had some difficulty, however, with finding these workers to be in maritime employment. He criticizes this hesitation:

> [W]hile the work done by fixed-platform workers may have been "basically the same whether performed on land or on the off-shore platform," the hazards certainly were not the same. All workers on drilling apparatus at sea are subject to hazards peculiar to the sea in addition to the entire range of dangers intrinsic to oilfield work. Men whose work involves the dangers incident to the movement of watercraft should continue to be classed as seamen. Others who are threatened

The decision that fixed-platform workers in territorial waters are not excluded from coverage because of their unique workplace does not end our inquiry in Gray's case. We must still determine whether he is within the Act's protection. The Act's situs and status tests must be satisfied. Compensation is payable under the LHWCA only if the disability results from "an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, ... or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." 33 U.S.C. § 903(a). The situs test in section 903(a) requires that the injury occur upon navigable waters or in an area adjoining navigable waters. The status test in section 902(3) requires that the worker be an employee which is defined as "any person engaged in maritime employment" 33 U.S.C. § 902(3).

Gray's case is slightly different from those presented by our prior decisions in *Boudreaux*, or *Ward v. Director, Office of Workers' Compensation Programs*, 684 F.2d 1114 (5th Cir. 1982), cert denied, __ U.S. __, 103 S.Ct. 815, 74

(Footnote 2 continued)

> by the dangers the ocean presents to a structure temporarily or permanently positioned on or in it should be classed as maritime workers. To exclude from the Longshoremen's Act workers on fixed-platforms within three miles from shore would produce an anomalous situation: All floating-rig workers would be entitled to maritime rights, either as seamen or as employees covered by the Longshoremen's Act; and workers on fixed platforms located beyond the three-mile line would be covered by the Longshoremen's Act by virtue of the Lands Act extension; but fixed-platform workers hurt within three miles from shore would be excluded from the domain of maritime remedies. Given the similarities in the hazards faced by all these workers, this distinction seems wholly unwarranted.

Id. at 995-96.

L.Ed.2d 1013 (1983), or the Supreme Court's recent pronouncement in *Director, Office of Workers' Compensation Programs v. Perini*, __ U.S. __, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983). In *Boudreaux*, the worker was injured on a drilling barge which was located upon navigable waters. *Boudreaux*, 680 F.2d at 1035-36. In *Ward*, the decedent was a pilot who "spotted fish" from on high. He was killed when his plane crashed into navigable waters. *Ward*, 684 F.2d at 1115. In *Perini*, the injured worker was standing on a cargo barge which was upon navigable waters. *Perini*, 103 S.Ct. at 638. These workers were covered because even before the 1972 amendments they were within the Act's reach to those employed on actual navigable waters. Gray on the other hand was injured while working on a fixed platform which *Rodrigue* requires be treated as an island. By its function the platform is a wharf. By its location, extending from an island it adjoins navigable waters. Therefore, the situs of Gray's injury was literally within the expanded shoreside coverage of the Act.

The status test was also added to the Act by the 1972 amendments. The intent of Congress in making these amendments was to expand the shoreside reach of the Act. *Boudreaux v. American Workover, Inc., supra.* The status test was added to identify those workers who would be covered within this new area. *Id.* The status test does not require a rigorous analysis for water-based workers injured upon navigable waters. Their coverage under the Act is nearly automatic. *Id.* at 1039; *Ward*, 684 F.2d at 1116. Deciding whether Gray was an employee of an employer engaged in maritime employment will determine whether he qualifies for coverage.

Maritime employment turns not on geography, but on the maritime nature of the work. *P. C. Pfeiffer Co. v.*

Ford, 444 U.S. 69, 73-83, 100 S.Ct. 328, 332-37, 62 L.Ed.2d 225 (1979). The purpose of the work is the central inquiry, not the particular skills used by the worker. *Trotti & Thompson v. Crawford* 631 F.2d 1214, 1221 n. 16 (5th Cir. 1980). The test to be used in this analysis is whether the work bore "a realistically significant relationship to traditional maritime activity." *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994, 998 (5th Cir. 1981). We must determine then whether Gray's work had a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters. *Odom Construction Co. v. United States Department of Labor*, 622 F.2d 110, 113 (5th Cir. 1980), *cert. denied*, 450 U.S. 966, 101 S.Ct. 1482, 67 L.Ed.2d 614 (1981).

Perini established that the use of this test is not necessary for water-based workers injured upon navigable waters. It reversed the United States Court of Appeals for the Second Circuit which applied the "realistically significant relationship" test to water-based workers. 103 S.Ct. at 639. *Perini* held that application of the status and situs tests must not be used to withdraw LHWCA coverage from workers, like Boudreaux, who were covered prior to the 1972 amendments. The fact that they were injured upon actual navigable waters is enough. This reasoning does not apply here. The "realistically significant relationship" test remains viable for workers injured upon land, be it natural or artificial. Gray is not within the group of workers traditionally covered prior to 1972. He was injured not upon navigable waters but on a wharf adjoining them.

Gray did welding and maintenance work on offshore platforms. At the time of his injury, he was welding gas lines. His work was necessary for the offshore drilling process in that gas line maintenance is vital to the drilling and

removal of gas and oil. Offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce. *Pippen v. Shell Oil co.*, 661 F.2d 378, 384 (5th Cir. 1981). Since Gray's work was a central part of that process, it obviously facilitated maritime commerce. Indeed, his work was "an intregral part" of maritime commerce, "an essential and indispensable step" in the offshore drilling process. *Hullinghorst Industries v. Carroll*, 650 F.2d 750, 756 (5th cir. 1980), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). He was clearly employed in maritime employment and therefore was within the compensation coverage afforded by the LHWCA.

For the reasons stated the order of the Benefits Review Board is

AFFIRMED.

APPENDIX "B"

HERB'S WELDING and United States Fidelity & Guaranty Company,
Petitioners,

v.

Robert H. GRAY and the Director, Office of Workers' Compensation Programs, United States Department of Labor,
Respondents.

No. 82-4147

United States Court of Appeals,
Fifth Circuit.

Aug. 8, 1983

Upon petition for rehearing and suggestion for rehearing en banc a decision of the United States Court of Appeals for the Fifth Circuit, 703 F.2d 176, which affirmed the Benefits Review Board's award of compensation under the Longshoremen's and Harbor Workers' Compensation Act applied to offshore oil field worker who was injured upon a platform located in Louisiana waters.

Petition and suggestion denied.

Petition for Review of an Order of the Benefits Review Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 18, 1983, 5th Cir. 1983,

703 F.2d 176).

Before CLARK, Chief Judge, THORNBERRY and REAVLEY, Circuit Judges.

PER CURIAM:

Herb's Welding, United States Fidelity & Guaranty Company and various *amici curiae* have petitioned this court for a panel or en banc rehearing of this case.

We address one point raised by Herb's Welding and its carrier. They suggest that our decision is contrary to our previous decision relating to the same accident. *Gray v. Chevron*, 644 F.2d 540 (5th Cir. 1980). There the same Robert H. Gray brought a tort action against Chevron, the owner of the fixed platform. Gray alleged his injuries were due to Chevron's negligence. Chevron moved for summary judgment claiming that under Louisiana workers' compensation law, it was Gray's statutory employer. Gray opposed the motion arguing that under the terms of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b), the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, was made applicable to his situation. (This is the same argument which the Benefits Review Board approved below in *Herb's Welding v. Gray*, but which we found unnecessary to reach). The district court in *Gray v. Chevron*, No. 76-0708 (W.D.La.1978), granted the summary judgment and dismissed the suit. The judge concluded that the Outer Continental Shelf Lands Act did not apply; that Louisiana law applied; that Chevron was Gray's statutory employer, and that as to Chevron, Gray's sole remedy was workers' compensation benefits. This court affirmed.

Herb's Welding acknowledges that the law of the case doctrine does not apply. However, it argues that if the LHWCA applies to Gray's accident, then Chevron could not assert a statutory employer defense since such immunity is not available under the federal act.

Our previous decision in *Gray v. Chevron* does not control our present case. The *Gray v. Chevron* opinion was rendered in 1978. It was affirmed in 1981 on the narrow issue of whether the district court correctly interpreted Louisiana's workers' compensation law in light of this court's decision in *Blanchard v. Engine and Gas Compressor Services, Inc.*, 613 F.2d 65 (5th Cir. 1980). Today's case, *Herb's Welding v. Gray*, is based on an inconsistent premise that the Longshoremen's and Harbor Workers' Compensation Act is applicable. Two facts, however, persuade us that *Gray v. Chevron* should not control here. First, *Gray v. Chevron* held that the Outer Continental Shelf Lands Act did not extend LHWCA coverage to Gray. That is not contrary to our present decision. It was not asserted at that time that the LHWCA could apply independent of the Lands Act. Second, since the initial decision, the LHWCA has undergone extensive interpretation. We must now consider the LHWCA in light of *Director, Office of Workers' Compensation Programs v. Perini*, __ U.S. __, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983); *Ward v. Director, Office of Workers' Compensation Programs*, 684 F.2d 1114 (5th Cir. 1982), *cert. denied*, __ U.S. __, 103 S.Ct. 815, 74 L.Ed.2d 1013 (1983); and *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. 1982) (en banc), *cert. denied*, __ U.S. __, 103 S.Ct. 815, 76 L.Ed.2d __ (1983). Given the guidance of these subsequent precedents it is obvious that the LHWCA on its own terms applies to Gray. This position was neither advocated nor decided in *Gray v. Chevron*.

The petition for panel rehearing is DENIED and no member of this panel nor Judge in active service on the Court having requested that the Court be polled on rehearing en banc, the suggestion for rehearing en banc is also DENIED.

APPENDIX "C"

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700-1111 20th Street, N.W.
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211 Main Street, Suite 600
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In the Matter of

ROBERT H. GRAY
Claimant

v.

HERB'S WELDING
Employer

U. S. F. & G.
Carrier

CASE NO. 77-LHCA-1308

OWCP NO. 7-39270

T. Gerald Henderson, Esquire
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For the Claimant

John F. Simon, Esquire
Gold, Little, Simon, Weems & Bruser
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For the Employer
and Carrier

Before: BEN H. WALLEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.*, hereinafter referred to as the Act, as extended to cover certain employees under the Outer Continental Shelf Lands Act, (OCSLA), 67 Stat 462. 43 U.S.C. §§ 1331, *et seq.*, hereinafter referred to as the Lands Act, which claim is for benefits because of an injury sustained while working as a welder on a fixed platform located within Bay Marchand Area, Block 3, State Lease Number 1367, within the territorial waters of the State of Louisiana.

Claimant has been paid temporary total disability, permanent partial disability, and medical expenses incident thereto under Louisiana State Compensation Laws and is now seeking to come under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Findings of Fact and Conclusions of Law

The parties agreed and stipulated to certain essential facts, which I accept, as follows: (1) Robert H. Gray, hereafter Claimant, sustained an injury on July 11, 1975, while working on a fixed platform, described as "E" Structure, in Bay Marchand Area, Block 3, State Lease No. 1367, in Louisiana State waters; (2) that Claimant was injured in the course of his employment with Herb's Welding, hereafter Employer, who was insured by United States Fidelity and Guaranty, hereafter Carrier, and was paid temporary total disability, permanent partial disabili-

ty and medical expenses incident thereto; (3) that Claimant's average weekly wage at the time of injury was $282.75; and for purposes of this hearing only, Claimant had suffered a ten (10) percent permanent partial impairment to the leg.

In addition, Claimant was paid temporary total disability benefits from July 11, 1975 to December 31, 1975, in the amount of $1,300.00; was paid the sum of $17.50 per week, the minimum under Louisiana law for a ten (10) percent permanent partial disability to the leg, for 107 weeks, in the amount of $1,872.50, making a total of $3,172.50; and the sum of $1,696.14 was paid for medical expenses. The only issue unresolved was whether this claim comes within the provisions of the Act.

The answer to the question of whether Claimant comes within the provisions of the Act can only be found in a determination that his work activities constitute "Maritime employment" within the meaning of section 2(3) of the Act, 33 U.S.C. § 902(3). Clearly, Claimant's work activity was on structure "E" situated wholly within the territorial waters of the State of Louisiana. He testified that he was quartered on Structure "M" for the entire week of July 10-16, 1975, and that his entire work-week was spent doing welding assignments, including but not limited to oil and gas field lines, on Structures "E", "D", "C & I", "C", "M" and "H", all of said structures being located wholly on the inward side of both the line of demarcation between the territorial waters of the State of Louisiana and the outer Continental Shelf and the "three mile line", identifying the "boundaries" of the State of Louisiana. An examination of the map (Pg. 1, Ex. 1), reveals two "lines" from well "18" to "E" structure and one "line" from Structure "M" to "E", with three "lines" running northward to

"C & I" structure. Thus, all of the oil and/or gas lines identified on the map show that they originate from or terminate at a well site or a fixed platform (structure) located wholly within the territorial waters of the State of Louisiana. Too, Claimant testified that he "had liked the Bay Marchand Field and had asked for a permanent job in the Bay Marchand Field" and was assigned to the northern part of that area in the latter part of 1972.

Claimant's work activity is totally involved in exploration, development and transmission of oil and gas from under and on submerged lands. His employer is likewise engaged. These activities are not relevant to traditional concerns of maritime law. *Rodrigue v. Aetna Casualty and Surety Co., et al.*, 395 U.S. 352, 23 L.Ed.2d 360, 89 S.Ct. 1835 (1969); *Bible v. Chevron Oil Co.*, 5th Cir. 460 F.2d 1218 (1972). Claimant's activity as a maintenance welder lacks any significant maritime connection. *Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (4/7/77); *Toups v. Chevron Oil Co., et at.*, 7 BRBS 261, BRB No. 76-453 (12/29/77).

Therefore, I find and conclude from the entire record of this cause that the claim does not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*), and that Claimant has been properly compensated for the injuries sustained under the laws of the State of Louisiana.

Order

Having found and concluded that the claim for benefits does not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by the Outer Continental Shelf Act, the claim

is hereby denied.

/S/ BEN H. WALLEY

BEN H. WALLEY
Administrative Law Judge

Dated: May 5, 1978
San Francisco, California

APPENDIX "D"

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 78-431

ROBERT H. GRAY
Claimant-Petitioner

v.

HERB'S WELDING
and
U.S. FIDELITY AND GUARANTY
Employer/Carrier-Respondents

Filed As Part Of The Record
June 17, 1980

(Clerk)
Benefits Review Board

DECISION and ORDER

Appeal from the Decision and Order of Ben H. Walley, Administrative Law Judge, U.S. Department of Labor.

T. Gerald Henderson (Gravel, Roy & Burnes), Alexandria, Louisiana, for the claimant.

Robert H. Gregory, Miami, Florida, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

Kalaris, Administrative Appeals Judge:

This is an appeal by claimant, Robert H. Gray, from a Decision and Order (77-LHCA-1308) of Administrative Law Judge Ben H. Walley, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, LHWCA), and extended by the Outer Continental Shelf Lands Act (hereinafter, OCSLA), 43 U.S.C. §1331 *et seq.*

Claimant was injured while working as a welder on a fixed platform located within the territorial waters of the state of Louisiana.

At a hearing before the administrative law judge, the parties agreed and stipulated to the following facts, which were subsequently adopted by the administrative law judge: claimant sustained an injury on July 11, 1975, while working on a fixed platform, described as an "E" structure, in Bay Marchand area, Block 3, State Lease No. 1367, in Louisiana state waters; claimant was injured in the course of his employment with Herb's Welding (hereinafter, employer), a company insured by U.S. Fidelity and Guaranty; claimant was paid temporary total disability, permanent partial disability and medical expenses incident thereto under Louisiana State workmen's compensation law; claimant's average weekly wage at the time of injury was $282.75; and, for purposes of the hearing only, claimant had suffered a 10 percent permanent partial impairment to his leg.

The sole issue at the hearing was whether the claim came within the provisions of the Act. In his Decision and Order, the administrative law judge commented that, in order to resolve the issue of coverage, he had to determine

whether claimant's work activities constituted "maritime employment" within the meaning of Section 2(3) of the Act. 33 U.S.C. §902(3). He concluded that claimant was not engaged in "maritime employment." This conclusion was based largely on findings me made as to claimant's employment activities and the nature of employer's business. Specifically, the administrative law judge found that claimant's employment activity was situated wholly within the territorial waters of the State of Louisiana. He further noted that claimant testified that he was quartered on structure "M" for the entire week of July 10-16, 1975, and that his entire work week was spent doing welding assignments, including but not limited to oil and gas field lines on Structures, E, D, C and I, C, M and H—each structure being located wholly on the landward side of both the line of demarcation between the territorial waters of Louisiana and the outer Continental Shelf and the three-mile line identifying the boundary of the State of Louisiana in the Gulf of Mexico. In addition, having examined the map offered into evidence as Claimant's Exhibit 1, the judge concluded that all of the oil and/or gas lines identified in the map show that they originate from or terminate at a well site or a fixed platform located wholly within Louisiana territorial waters.

The administrative law judge determined that claimant's work activity totally involved the exploration, development and transmission of oil and gas from under and on submerged lands and, furthermore, that claimant's employer was similarly engaged. Citing the Supreme Court decision *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), the administrative law judge observed that "these activities are not relevant to traditional concerns of maritime law." In addition, relying on *Anderson v. McBroom Rig Building Service Inc.*, 5 BRBS 713, BRB

No. 75-198 (1977), and *Toups v. Chevron Oil Co.*, 7 BRBS 261, BRB No. 76-453 (1977), the administrative law judge found that "claimant's activity as a maintenance welder lack[ed] any significant maritime connection." The administrative law judge therefore held that the claim did not come within the provisions of the Act, and that claimant had been properly compensated under state workmen's compensation law.

We must first determine whether the administrative law judge erred in relying upon *Toups, supra*, and *Anderson, supra*, to conclude that claimant had to demonstrate work activities which constitute "maritime employment." The claims in those cases were filed pursuant to the LHWCA; claimant in the instant case seeks benefits under the OCSLA. A clear distinction must be drawn between the jurisdictional tests of the LHWCA and the OCSLA, and we hold that the administrative law judge erred in applying the "maritime employment" test of the LHWCA to a claim under OCSLA.[1]

Claimant contends that jurisdiction is not determined solely by the location of the accident, arguing that it would be unreasonable to determine entitlement on the

[1] As the court stated in *Goodart v. Maryland Casualty Co.*, 139 So.2d. 567 (La.App. 1962), "Plaintiff contends that the OCSLA applies only to maritime workers. We can find no such requirement in the Act...." 139 So.2d. at 570. *See also* Larson, *The Law of Workmen's Compensation*, 89.33 at 16-189: "Although the constitutional maritime power of the United States includes not only the navigable waters of the United States but the high seas as well, it seems clear from the choice of statutory language that Congress intended to confine the Longshoremen's Act to the territorial navigable waters of the United States. This intent is indicated by the fact that, when Congress wanted to cover injuries sustained in oil drilling operations beyond the territorial waters of the United States, it felt it necessary to pass a separate act, the Outer Continental Shelf Act, applying the provisions of the Longshoremen's Act to such injuries."

basis of such a fortuitous factor as where the claimant was located when injured. Citing 43 U.S.C. §1333(b), he maintains that the issue is whether the controversy "arises out of or in connection with" operations on the outer Continental Shelf involving transportation of natural resources, and urges that the jurisdictional test should be whether claimant's overall duties bear a fair and substantial relationship to the exploration and transportation of natural resources from the outer Continental Shelf. This test, claimant suggests, is dictated by case precedent.[2]

We agree with claimant that he is not precluded from coverage by the OCSLA simply because he was injured in state territorial waters and that the "strict locality" test urged by employer[3] is not mandated by the OCSLA. We also find coverage. However, our ruling is based upon a rationale different from that proffered by claimant.

Section 1333(b), upon which claimant relies, provides in pertinent part:

> The United States district courts shall have original jurisdiction of cases and controversies

[2] Claimant cites the cases of *Nations v. Morris*, 483 F.2d. 577 (5th Cir. 1973), *cert. denied*, 414 U.S. 1071 (1973), and *Higginbotham v. Mobil Oil Corp.*, 357 F. Supp. 1164 (W.D. La. 1973), *rev'd in part*, 545 F.2d 422 (5th Cir. 1977), in support of his argument. However, we decline to adopt claimant's contentions on the ground that both cases involved accidents occurring on the high seas, over the outer Continental Shelf, not in state territorial waters.

[3] At oral argument held before the Board December 19, 1979, employer's counsel, when questioned regarding a "situs test," responded, "[I]f you have a direct line, you are sending in the oil from the outer continental shelf and that line comes within the three-mile area of the state and these is a welder down there under the water welding, that, I would concede that probably under the Lands Act he is entitled to benefits." (Oral Argument Transcript, pp. 36-37)

> arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf.

43 U.S.C. §1333(b).[4] We interpret Section 1333(b) as vesting in the district courts[5] the power to adjudicate controversies arising out of or in connection with any operations therein described. It reflects the intent of Congress to establish a "comprehensive, unqualified, unlimited claim of Federal sovereignty" over outer Continental Shelf activities. *Pure Oil Co. v. Snipes*, 293 F.2d. 60 (5th Cir. 1961). *See also Fluor Ocean Services, Inc. v. The Rucker Co., Inc.*, 341 F. Supp. 757 (E.D. La. 1972). Therefore, while this subsection establishes federal jurisdiction over cases arising out of or in connection with the operations it describes, it does not establish the parameters of coverage of the OCSLA for workmen's compensation claims. It therefore does not confer coverage of the OCSLA over this claim.

However, Section 1333(c) does establish those parameters and does confer coverage over this case. That section provides, in pertinent part, that "[w]ith respect to disability or death of an employee resulting from any injury occurring as the result of operations described in

[4] In 1978, the statute was amended, and a few significant changes in the language and organization of the statute were made. *See* 3 *U.S. Code Cong. & Adm. News* 1534, 1568 (1978). However, we conclude that the unamended OCSLA is applicable to the instant case since both the injury and the disability occurred prior to the passage of the amendments.

[5] See discussion *infra* at fn. 6, with reference to Section 1333(c), delineating from what source the Board derives its power to adjudicate claims under the OCSLA.

[Section 1333(b)], compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act." 43 U.S.C. §1333(c).[6] As stated earlier, those operations are

> operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf....

43 U.S.C. §1333(b). Section 1331(a) defines the term "outer Continental Shelf" as "all submerged lands lying outside of the areas of land beneath navigable water" as defined in Section 1301 of the Submerged Lands Act. 43 U.S.C. §1331(a); 43 U.S.C. §1301. The definition of "lands beneath navigable waters" is complex; however, for the most part, state boundaries lie three miles from the coastlines and the area within that three-mile limit are lands beneath navigable water.

Accordingly, to establish coverage one must prove a

[6] Section 1333(c) incorporates by reference Section 19(b) of the LHWCA, as amended, which transferred from the federal district courts to the Board the power to review claims arising under the LHWCA and its extensions, including the OCSLA. 33 U.S.C. §919(b). Thus, the Board has the power to hear this claim and others filed pursuant to the OCSLA.

Section 21(c) of the amended LHWCA provides, in pertinent part, that the Board's decisions are reviewable in the United States Court of Appeals. 33 U.S.C. §921(c). Citing *Presley v. Tinsley Maintenance Service*, 529 F.2d. 433 (5th Cir. 1976) and *Offshore Food Service, Inc. v. Benefits Review Board*, 524 F.2d. 967 (5th Cir. 1975), the Fifth Circuit in *Director, OWCP v. Alabama By-Products Corp.*, 560 F.2d 710 (1977), noted that it has entertained petitions for review of OCSLA awards processed under amended LHWCA procedures, thereby recognizing the jurisdiction of the Board over cases brought under the OCSLA. *See also Pearce v. Director, OWCP*, No. 77-2074 (9th Cir. August 31, 1979).

disability or death resulting from any injury *occurring as a result* of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf.

Evidence was adduced at the hearing that established that claimant's work was performed both in territorial waters and on the outer Continental Shelf; in fact, claimant estimated that approximately 25 percent of his time was spent aboard the K and M platforms located on the outer Continental Shelf. Moreover, the platform on which claimant was injured was fed by a gas flow line that extended out to the outer Continental Shelf. Finally, the operations conducted by employer were located on both sides of the three-mile line of demarcation.

Insofar as claimant's employment as a maintenance welder is integrally related to the operations enumerated in Section 1333 of the OCSLA, and insofar as his injury was incurred as a result of such activity, we hold that claimant has established coverage under the Act.

Accordingly, we reverse the decision below, and remand for further proceedings in accordance with this determination.

SO ORDERED.

/S/ISMENE M. KALARIS
ISMENE M. KALARIS
Administrative Appeals Judge

I Concur:

/S/JULIUS MILLER
JULIUS MILLER
Administrative Appeals Judge

SMITH, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's reversal of the decision below. I do agree with some of their reasoning: (1) that the unamended Outer Continental Shelf Lands Act (hereinafter, OCSLA), 43 U.S.C. §1333, applies to this case; (2) that the "maritime employment" status test in Section 2(3) of the Longshoremen's and Harbor Workers Compensation Act (hereinafter, LHWCA), 33 U.S.C. §902(3), which the administrative law judge applied, is inapplicable to a case arising under OCSLA; and (3) that the administrative law judge's reliance on *Anderson v. McBroom Rig Building Service, Inc.*, 5 BRBS 713, BRB No. 75-198 (1977), and *Toups v. Chevron Oil Co.*, 7 BRBS 261, BRB No. 76-453 (1977) was erroneous, since these cases were brought only under the LHWCA. However, I strongly disagree with the majority's construction of Section 1333(b) & (c) and their finding of jurisdiction in this case.

To establish jurisdiction, a claimant must prove:

> ...disability or death of an employee resulting from an injury occurring as a result of operations described in subsection (b) [operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf]...For the purposes of the extension of the provisions of the Longshoreman's and Harbor Workers' Compensation Act under this section—(1) the term "employee" does not include a master or member of the crew of any vessel, or an officer or employee of the U.S. or any agency thereof or of any State or foreign government, or any political subdivision thereof; (2) the term "employer" means an

> employer any of whose employees are employed in such operations...

43 U.S.C. §1333(c). The claimant in this case was an employee who was injured on an oil platform in state territorial waters but who performed 25 percent of his work duties (welding oil pipelines) on the Outer Continental Shelf. There is no case law on point which applies the section above to such facts.

Section 1333(c) is ambiguous on its face. Several questions arise: Does the language mandate a moment of injury test and a situs test? How broadly or narrowly should the phrase "as a result of operations" be construed? Must the employee have actually worked on the Outer Continental Shelf at the time of his injury, or is he covered if he worked in part over the Outer Continental Shelf even though his injury did not occur there?

Since Section 1333(c) is ambiguous, the Congressional intent in enacting the OCSLA must be determined.

> In expounding a statute, we must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy... [Cites omitted] Our objective...is to ascertain the congressional intent and give effect to the legislative will... [I]t is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, becasue not within its spirit nor within the intention of its makers...

Philbrook v. Glodgett, 95 S.Ct. 1893, 1898 (1975).

> Where a word or phrase is reasonably capable of more than one meaning, a court should look to the

> entire text of the statute and to its legislative history in order to ascertain, if possible, the intent of the drafters and the true scope and meaning of the term.

Schwartz v. Romnes, 495 F.2d 884, 849 (2d Cir. 1974).

Examination of the entire statute reveals that the scope of OCSLA is confined to a specific geographic area—the Outer Continental Shelf—which is defined in Section 1331(a). The definition is all submerged lands lying seaward of "lands beneath navigable waters" as defined in the Submerged Lands Act, 43 U.S.C. §1301(a). The jurisdiction of the OCSLA is stated in Section 1332(a):

> It is hereby declared to be the policy of the U.S. that the subsoil and seabed of the outer Continental Shelf appertain to the U.S. and are subject to its jurisdiction, control, and power of disposition as provided in this Act.

The Act provides for federal leasing and federal power to regulate the conservation of the natural resources but only for the Outer Continental Shelf. 43 U.S.C. §§1334, 1335, 1337. The Coast Guard is authorized to promulgate and enforce regulations to promote safety of life and property but only for artificial islands and structures on the Outer Continental Shelf. 43 U.S.C. §1333(e)(1); 33 C.F.R. §140.05-1. It is significant that Congressional concern for safety conditions affecting employees did not extend to artificial islands in state territorial waters.

The legislative background of the OCSLA and the Submerged Lands Act was summarized in *Zabel v. Tabb*, 430 F.2d 199, 205 (5th Cir. 1970), *cert. den.*, 401 U.S. 910

(1971).[1]

> The controversy, often pressed with emotional overtones, was over oil and gas and whether the states were to reap the economic benefits of development royalties and to regulate the exploration and development or whether these benefits and these controls were be exercised by the Federal Government as an adjunct of then newly declared "paramount rights". *United States v. California*, 1947, 332 U.S. 804, 805, 68 S.Ct. 20, 21, 92 L.Ed. 382, 383. The Act and this relinquishment [quitclaim to the coastal states of submerged lands within three miles of the coast] reflect the legislative compromise found in the combination of the Submerged Lands Act and the Outer Continental Shelf Act. The adjacent states were to be the "owner" of the resources and reap exclusively the economic benefits of resources in the tidelands and have full control over management and exploitation. The Federal Government, on the other hand, was given exclusive ownership and control vis-a-vis the states in the Outer Continental Shelf.

The Supreme Court reviewed the legislative history of the OCSLA in *Rodrigue v. Aetna Casualty and Surety Co.*, 89 S.Ct. 1835, 1837-1838 (1969(.[2]

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[1] *Zabel* was an action by landowners to compel the Secretary of the Army to issue a permit to dredge and fill in navigable waters of a by. The court held that the Submerged Land Act does not relinquish Congress's constitutional power over commerce to regulate use of submerged riparian property for conservation purposes.

[2] *Rodrigue* involved wrongful death actions, where the workers died on artificial island drilling rigs located on the Outer Continental Shelf off the Los Angeles coast. The issue was whether the High Seas Act or the OCSLA with its incorporation of state law (under certain circumstances) applied. The court held the latter applied.

> The purpose of the [Outer Continental Shelf] Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures...on the Outer Continental Shelf. That this law was to be federal law of the United States, applying state law only as federal law and then only when not inconcistent with applicable federal law, is made clear by the language of the Act.... It is evident from this that federal law is "exclusive" in its regulation of this *area*, and that state law is adopted only as surrogate federal law.... [emphasis added]
>
> As Senator Anderson, a member of the conference committee, put it: "The real point is...that the language in Section 4 [43 U.S.C. §1333] provides that Federal laws and regulations shall be applicable in the *area*, but that where there is a void, the State law may be applicable.... [emphasis added]

The court noted Senator Gordon's explanation of the bill's inception:

> The committee first attempted to provide housekeeping law for the outer shelf by applying to the structures necessary for the removal of the minerals in the area under the maritime law of the United States. This was first attempted by incorporating by reference the admiralty statutes. This solution at first seemed to be a reasonably complete answer * * * inasmuch as the drilling platforms would have been treated as vessels. Maritime law, which applies to American vessels, would have applied under that theory to the structures themselves.
>
> However, further consideration clearly showed that this approach was not an adequate and

complete answer to the problem. The so-called social laws necessary for protection of the workers and their families would not apply. I refer to such things as unemployment laws, *industrial-accident laws*, fair-labor-steward laws, and so forth.

[Ultimately, instead,] the whole body of Federal law [was made applicable] to the *area* [as well as state law where necessary]. Thus, the legal situation is comparable to that in the areas owned by the Federal Government under the exclusive jurisdiction of the Federal Government and lying within the boundaries of a State in the uplands. 99 Cong. Rec. 6963. [emphasis added].

Another strong indication of the Congressional intent that the OCSLA's incorporation of the LHWCA is to apply only to a specific geographic area is contained in the 1953 Conference Report for the OCSLA.

> ...Certain Federal laws are made applicable to the *area*, such as the Longshoremen's and Harbor Workers' Act.... [emphasis added]

1953 *U.S. Code Cong. and Adm. News* 2177, 2184.

Two cases, not on point with the facts of this case, emphasize the geographic area contemplated by the OCSLA and a moment of injury test. In the first case, *Reagan Equipment Co. v. P. J. Donovan*, 296 F.Supp. 535 (E.D. La. 1968), one of the issues on appeal was whether the claim was a state or federal compensation matter. The court affirmed the Deputy Commissioner's conclusion that the OCSLA applied, because the injury which caused decedent's death occurred within the geographic area contemplated by the Act. In the second case, *Bible v.*

Chevron Oil Co., 460 F.2d 1218 (5th Cir. 1972), the court applied a situs test in concluding that the OCSLA has no application to a personal injury case, where the drilling platform upon which appellant was injured was located within Louisiana territorial waters about a mile from the coast. The court held that the case was a non-maritime diversity suit controlled entirely by Louisiana law.

In summary, examination of the entire statute, the legislative history, and the two cases cited above indicate that the legislative intent was that the scope of application of the OCSLA is *only* to the geographic area of the Outer Continental Shelf. Since the OCSLA itself has no applicability to areas other than the Outer Continental Shelf, the incorporation of the LHWCA in Section 1333(c) likewise cannot extend to other areas, such as state territorial waters. Section 1333(c) must be read in context with 43 U.S.C. §1333(a)(1) which extends federal laws only to the Outer Continental Shelf. Thus, the phrase "injury occurring *as the result of* operations..." should be construed to provide coverage only when the injury (leading to disability or death) arises from or is the specific consequence of operation(s) conducted on the Outer Continental Shelf and the injury also occurs there.[3]

The majority's interpretation of Section 1333(c) disregards the Congressional intent of the scope of application of the OCSLA and tremendously expands the geographic

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[3] The phrase "as a result of" was construed to avoid a fortuitous result in *Higginbotham v. Mobil Oil Corp.*, 357 F. Supp. 1164 (W.D. La. 1973), *rev'd in part*, 545 F.2d 422 (5th Cir. 1977), where the court applied the OCLSA to a decedent killed in a helicopter crash in the high seas *over* the Outer Continental Shelf. The crash occurred some distance from the stationary platform where he had been temporarily assigned. The interpretation indicates the limit of flexibility Congress probably intended by using the phrase "as a result of...."

area to which the incorporated LHWCA applies. The majority has apparently adopted a jurisdiction test which looks to whether the employee's job duties are "integrally related" to operations on the Outer Continental Shelf and whether his injury was incurred as a result of such activity.

In finding coverage, the majority cites as support the fact that the platform in state territorial waters on which claimant was injured was fed by a gas flow line that extended out to the Outer Continental Shelf.[4] However, the evidence is that claimant's injury was not "as a result" of an operation conducted on the Outer Continental Shelf. The pipeline which claimant was welding at the time of injury did not extend to the Outer Continental Shelf, but only went from one part of the platform to another part of it. Hearing Transcript, p. 42. *See also,* Oral Argument Transcript, p. 14.

The majority's reliance on the "fact" of a pipeline connection from an artificial island in state territorial waters to the Outer Continental Shelf has the practical effect that state compensation law will rarely, if ever, apply to workers injured in state territorial waters.[5] In the oil fields which straddle both the Outer Continental Shelf and adjacent state territorial waters, nearly all of the oil platforms in state territorial waters are likely to have some oil or gas pipeline connections to the Outer Continental Shelf.

[4] The administrative law judge made a contrary finding of fact. He concluded that the "E" structure on which claimant worked had no connections to the Outer Continental Shelf. Decision and Order, p.3. Claimant's Exhibit No. 1, a map of the area in which he worked, fails to indicate with any degree of certitude the connections between the different structures and the Outer Continental Shelf.

[5] Claimant's counsel admitted this at oral argument. Oral Argument Transcript, p. 16.

Where claimants can prove the connections, state compensation law will not apply under the majority's theory, despite the fact that the Submerged Lands Act gave to the coastal states:

> ...title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters, and the right and power to *manage,* administer, lease, and develop, and use the said lands and natural resources all *in accordance with applicable State law*... [emphasis added]

43 U.S.C. §1311(a). Furthermore, under the majority's extremely broad theory, an oil worker injured on state land at a gas/oil tank storage area which had pipeline connections to the Outer Continental Shelf would be covered under the OCSLA!

In finding that claimant's employment is integrally related to operations on the Outer Continental Shelf, the majority cites claimant's testimony that approximately 25 percent of his work activities or time was spent on platforms on the Outer Continental Shelf. However, there is no statutory status test that the employee's work be "integrally related" to certain operations on the Outer Continental Shelf. The only status test is that the person injured and disabled be an "employee" of an employer with any employee who is engaged in such operations and that the employee not be a master or member of a crew or an officer or employee of the U.S. or any state. *See Reagan Equipment Co. v. P. J. Donovan, supra,* which held that the OCSLA does not require that the employee himself be engaged in exploration for and recovery of natural resources nor that his employer be engaged in that

business.

In their construction of Section 1333(c), the majority appears to be rejecting a strict moment of injury test and a strict situs test. Instead, they appear to be adopting a status test analogous to the one resulting from the 1972 Amendments to the LHWCA. That test was explained in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977). In interpreting the 1972 Amendments which do *not* affect the OCSLA, the Court rejected the previous interpretation of Act which used a moment of injury test and instead focused on the nature of claimant's overall employment. the court extended coverage to employees on a covered situs who spend at least part of their time in longshoring acativities or the functional equivalent.

In this case, the unamended 1953 OCSLA applies. The statutory language "with respect to injury, disability or death of an employee resulting from any injury...", 43 U.S.C. §1333(c), is nearly identical to the language in Section 3(a) of the LHWCA, 33 U.S.C. §903, which was construed as mandating a moment of injury test prior to the 1972 Amendments. *See Caputo, supra,* at 265. Statutes containing similar language and sharing common *raison d'etre* should be interpreted *pari passu. Northcross v. Board of Education,* 93 S.Ct. 2201 (1973). Since the 1972 Amendments to the LHWCA did not amend §1333 of the OCSLA and since the 1978 Amendments to OCSLA (Pub. L. No. 95-372) also did not alter this jurisdictional language, there is no evidence that Congress intended to reject the moment of injury test in the OCSLA.

Thus, I would affirm the administrative law judge's denial of jurisdiction under the OCSLA, given his finding (and the parties' stipulation) that claimant's injury

occurred on an oil platform in the territorial waters of Louisiana, not on the Outer Continental Shelf.

/S/SAMUEL J. SMITH
SAMUEL J. SMITH, Chief
Administrative Appeals Judge

Dated this 17th day
of June 1980

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3569

HERB'S WELDING and UNITED STATES FIDELITY & GUARANTY COMPANY,

Petitioners

versus

ROBERT H. GRAY and DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,

Respondents.

On Petition For Review of An Order of the Benefits Review Board

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Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of respondent Director, Office of Workers' Compensation Programs, to dismiss the petition for review is GRANTED without prejudice to re-filing after final order of the Benefits Review Board.

APPENDIX "F"

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 901, 1001 Howard Avenue
New Orleans, LA 70113

Case No. 77-LHCA-1308R

OWCP No. 7-39270

In the Matter of

ROBERT H. GRAY, JR.

Claimant

against

HERB'S WELDING

Employer

U. S. F. & G.

Carrier

DECISION AND ORDER ON REMAND

This is a claim for compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901, *et. seq.*, hereinafter referred to as the Act, as extended to cover certain employees under the Outer Continental Shelf Lands Act, (OCSLA), 67 Stat 462. 43 U.S.C. §§1331, *et seq.*, hereinafter referred to as the Lands Act, which claim is for benefits because of an injury sustained while working as a welder on a fixed platform located within Bay Marchand Area, Block 3, State Lease Number 1367, within the territorial waters of the State of Louisiana.

A hearing was held in Alexandria, Louisiana, and a Decision and Order was issued on May 5, 1978, denying the claim because it did not come within the provisions of the Longshoremen's and Harbor Worker's Compensation Act as extended by the Outer Continental Shelf Lands Act. Claimant was aggrieved and appealed the Decision and Order and, for reasons hereinafter set out, the Benefits Review Board did, on June 17, 1980, reverse the Decision and Order and remand it for further proceedings in accordance with its order. *Gray v. Herb's Welding and U.S. Fidelity and Guaranty Company,* BRB No. 78-431, 12 BRBS 752 (6-17-80).

An appeal was made to the Fifth Circuit Court of Appeals and on September 22, 1980, the Fifth Circuit dismissed the Petition for Review "without prejudice to re-filing after Final Order of the Benefits Review Board." Thus, on November 20, 1980, this case was remanded to this office "for further proceedings consistent with its Decision and Order of June 17, 1980."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Order of Remand a Notice of Hearing to be held on March 9, 1981, was issued and upon receipt of the Notice the parties were able to agree on a procedure that would eliminate the need for further hearing. The parties agreed that inasmuch as the Benefits Review Board had held that Claimant had "established coverage under the Act (which holding the Employer and Carrier dispute and intend to appeal)," supplemental facts could be furnished to meet the terms of the Order of Remand without the hearing.

Material facts of record, supplemented by facts set

out in the Brief on Behalf of the Employer and Carrier, and confirmed by letter from Counsel for Claimant dated March 6, 1981, are separately identified as to source and are set out hereafter.

At the original hearing the parties stipulated and agreed to certain facts, which I accepted, as follows: (1) Robert H. Gray, hereafter Claimant, sustained an injury on July 11, 1975, while working on a fixed platform, described as "E" Structure, in Bay Marchand Area, Block 3, State Lease No. 1367, in Louisiana state waters; (2) that Claimant was injured in the course of his employment with Herb's Welding, hereafter Employer, who was insured by United States Fidelity and Guaranty, hereafter Carrier, and was paid temporary total disability, permanent partial disability and medical expenses incident thereto; (3) that Claimant' average weekly wage at the time of injury was $282.75; and for purposes of this hearing only, Claimant had suffered a ten (10) percent permanent partial impairment to the leg.

In addition, it was found and determined at the original hearing that Claimant had suffered and was paid benefits for a temporary total disability from July 11, 1975, to December 31, 1975, in the amount of $1,300.00; was paid the sum of $17.50 per week, the minimum under Louisiana Law for a ten (10) percent permanent partial disability to the leg, for 107 weeks, in the amount of $1,872.50, making a total of $3,172.50; and the sum of $1,696.14 was paid for medical expenses. The only issue unresolved was whether this claim comes within the provisions of the Act.

To confirm these basic facts and extend them to cover the "benefits" according to the provisions of the Act (33 U.S.C., Section 901, et seq.), Counsel for Employer-

Carrier submitted a Brief, restating the average weekly wage to be $282.75, providing a compensation rate of $188.50, and that it had been "stipulated that if the Claimant were found to be entitled to benefits, they would be based on a 10% permanent partial impairment to the leg." (For reasons hereinafter set out, I find that Claimant is entitled to "benefits"). The Brief further submitted that since the loss of a leg provides for the payment of benefits for 288 weeks (under LWHCA), a 10% permanent partial impairment to the leg would require payments for 28.8 weeks. The sum of $188.50 per week for 28.8 weeks amounts to $5,428.80, and "if the Claimant was entitled to benefits (which I have found), temporary total disability benefits would be due for a period of 25 weeks from July 11, 1975, to December 31, 1975, or $14,712.50."

When the amount of temporary total disability benefits ($4,712.50) are added to the permanent partial disability benefits ($5,428.80), the total is $10,141.30. The record shows that the Claimant has already been paid a total of $3,172.50 in weekly compensation benefits under the Louisiana Workmen's Compensation Act (ORP, page 15, lines 11-23), and when that sum is subtracted from the total of $10,141.30, the difference equals $6,968.80.

It is submitted that $6,968.80 is the proper figure to be awarded to the Claimant under the ruling of the Benefits Review Board.

As stated above, insofar as the parties are concerned, the foregoing submission of facts, as extended, are sufficient to meet the terms of *Gray v. Herb's Welding, et al, supra*, and I accept them subject only to any penalties and interest as may be required by law. Also, as stated above, "the only issue unresolved was whether this claim comes

with the provisions of the Act."

Based upon the stipulated facts set out above and other facts identified by the Board on appeal, particularly "that Claimant's employment activity was situated wholly within the territorial waters of the State of Louisiana," I mistakenly concluded that "the claim did not come within the provisions of the Act, and that Claimant had been properly compensated under state workmen's compensation law."

On appeal and after a discussion of the contentions of the parties, the Board stated:

We agree with Claimant that he is not precluded from coverage by the OCSLA simply because he was injured in state territorial waters and that the "strict locality" test urged by Employer is not mandated by the OCSLA. We also find coverage. However, our ruling is based upon a rationale different from that proferred by Claimant. (Footnote omitted).

After a discussion of the Lands Act, 43 U.S.C., Section 1331, et seq., and certain evidence adduced of record, the Board concluded:

Accordingly, to establish coverage one must prove a disability or death resulting from any injury *occurring as a result* of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources of the subsoil and seabed of the outer Continental Shelf.

Insofar as Claimant's employment as a maintenance welder is integrally related to the operations enumerated in

Section 1333 of the OCSLA, and insofar as his injury was incurred as a result of such activity, we hold that Claimant has established coverage under the Act.

Accordingly, we reverse the decision below, and remand for further proceedings in accordance with this determination.

Therefore, in compliance with the findings and determinations of the Benefits Review Board and the facts set out above, I find and conclude that this claim comes within the provisions of the Act, 33 U.S.C., Section 901, et seq., as extended by 43 U.S.C., Section 1331, et seq., and Claimant should be compensated accordingly.

ORDER

It is therefore Ordered:

1. That Claimant, Robert H. Gray, Jr., is hereby found to have sustained an industrial injury to a leg on July 11, 1975, and as a result thereof suffered a temporary total disability from July 11, 1975, to December 31, 1975, and thereafter he suffered a ten (10%) percent permanent partial disability to his leg, and

2. That Employer-Carrier paid Claimant compensation benefits for the time and in the amounts set out hereinabove; and

3. That Employer-Carrier shall pay to Claimant compensation benefits based upon his average weekly wage of $282.75 for a temporary total disability from July 11, 1975, to December 31, 1975, and thereafter it shall pay Claimant for a ten (10%) permanent partial disability for 288 weeks,

taking credit for all sums actually paid as compensation benefits under the laws of the State of Louisiana, said payments to the calculated and paid for the respective periods of disability, and paid in a lump sum, together with an amount equal to ten (10) percentum of the amount due and owing, plus interest at the rate of six (6) percent per annum from the date each separate amount became due and owing until paid in full, as provided by Section 14(e) of the Act (33 U.S.C., Section 914(e); and

4. Employer-Carrier shall pay all medical expenses accrued or to accrue as provided by Section 7 of the Act (33 U.S.C., Section 907), taking credit for all medical expenses heretofore paid; and

5. That an attorney's fee will be considered and acted upon when and if an application therefor is filed in accord with the Act and the regulations within ten (10) days from service of this Order, within five (5) days allowed to opposing Counsel to consider and act thereon.

/S/BEN H. WALLEY
BEN H. WALLEY
Administrative Law Judge

Dated: 16 March 1981
New Orleans, Louisiana

APPENDIX "G"

BENEFITS REVIEW BOARD
U.S. DEPARTMENT OF LABOR

No. 81-643

ROBERT H. GRAY
Claimant-Respondent

v.

HERB'S WELDING
and
U.S. FIDELITY AND GUARANTEE
Employer/Carrier-Petitoners

Filed As Part Of The Record
April 8, 1982

Clerk
Benefits Review Board

(Not Published)

DECISION AND ORDER

Appeal from the Decision and Order on Remand of Ben H. Walley, Administrative Law Judge, U.S. Department of Labor.

James J. Brady (Gravel, Robertson and Brady), Alexandria, Louisiana, for the claimant.

John F. Simon (Gold, Little, Simon, Weems and Bruser), Alexandria, Louisiana, for the employer/carrier.

Before: RAMSEY, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative

Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by employer/carrier from a decision and Order on Remand (77-LHCA-1308R) of Administrative Law Judge Ben H. Walley, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, LHWCA), as extended by the Outer Continental Shelf Lands Act (hereinafter, OCSLA), 43 U.S.C. §1331 *et seq.*

This is the second time this case has been considered by the Board. The facts are adequately discussed in the first decision, *Gray v. Herb's Welding,* 12 BRBS 752 (1980), wherein we reversed the determination of the administrative law judge and held that the claim was within the coverage of the OCSLA. The case was remanded to the administrative law judge for further proceedings including entry of an award if appropriate.

Employer/Carrier filed an appeal of the Board's decision with the United States Court of Appeals for the Fifth Circuit. That appeal was dismissed without prejudice by the court because the Board's decision was not a final order. *Herb's Welding v. Gray,* No. 80-3569 (5th Cir. Sept. 22, 1980) (Order).

On remand, the administrative law judge accepted the stipulations of the parties, determined that the claimant suffered a 10 percent loss of use of the leg as a result of the employment injury and awarded benefits based on an average weekly wage of $282.75. 33 U.S.C. §908(c)(2) and §908(c)(19).

Employer/carrier has appealed from this decision on remand, arguing that the Board's first decision of this case is erroneous. Specifically, employer/carrier argues that the Board's decision was based on factual conclusions which were not supported by the evidence and which were in opposition to factual findings made by the administrative law judge. It also argues that the Board erred in the legal conclusion that claimant's injury occurred "as a result of operations" conducted on the outer Continental Shelf. 43 U.S.C. §1333(b) and (c).

With regard to employer/carrier's substantive arguments on appeal, we note that these arguments raise the same issue which was decided by this Board in its first decision. *See Gray v. Herb's Welding*, 12 BRBS 752 (1980). This decision constitutes the law of the case and thus governs our determination herein. *See United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, *reh. denied*, 339 U.S. 972 (1950); *McNeil v. Prolerized New England Co.*, 11 BRBS 576 (1979), *aff'd sub nom. Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980).

Accordingly, we adhere to the Board's prior detrmination that claimant is covered by the OCSLA. The administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED

/S/ISMENE M. KALARIS
ISMENE M. KALARIS
Administrative Appeals Judge

I Concur:

/S/JULIUS MILLER
JULIUS MILLER
Administrative Appeals Judge

RAMSEY, Chief Administrative Appeals Judge, concurring:

I agree with the majority that the Board's decision in this matter is controlled by the principle of the law of the case. However, I did not participate in the Board's original decision of this case, and by concurring in this second decision I do not express an opinion as to the coverage issue determination previously made by the Board.

/S/ROBERT L. RAMSEY
ROBERT L. RAMSEY, Chief
Administrative Appeals Judge

Dated this 8th day
of April 1982